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FILED
JUN 22 1960
JAMES R. BROWNING, Clerk

Supreme Court of the United States

October Term, 1959

No. 1026 166

PETER HOLM,
Petitioner,

against

AMERICAN SHIP BUILDING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

S. ELDRIDGE SAMPLINER,
Counsel for Petitioner,
812 Huron Road,
Cleveland, Ohio.

GOLDSTEIN & STERENFELD,
VICTOR G. HANSON,
Of Counsel,
32 Broadway,
New York 4, New York.

HARVEY GOLDSTEIN,
On the Brief.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled matter on March 23, 1960.

Opinions of the Courts Below

The opinion of the United States District Court for the Northern District of Ohio, Eastern Division, Hon. James C. Connell, in favor of respondent, is unreported and is set out in the appendix to this petition at pages 26-31.

The opinion of the United States Court of Appeals for the Sixth Circuit, affirming the decision of the Trial Court, is reported at 276 F. 2d 201, advance sheets, and is set out in the appendix to this petition at pages 23-25.

Jurisdiction

This action for money damages for respondent's failure to provide petitioner with a reasonably safe place to work, predicated upon diversity of citizenship, having the requisite jurisdictional amount, was brought in the United States District Court for the Northern District of Ohio, Eastern Division.

The Order of Dismissal and Judgment thereon, entered on February 12, 1959, was appealed from by petitioner.

The decision of the United States Court of Appeals for the Sixth Circuit affirming the Judgment of the lower Court was filed on March 23, 1960.

The jurisdiction of this Court is invoked under Title 28 U. S. C. § 1254(1).

Questions Presented

1. Whether the Court below deprived petitioner of any substantive admiralty rights as defined in the controlling acts of Congress or by interpretive judicial decision in ruling that state law was applicable because a complaint was filed (having proper diversity of citizenship and requisite jurisdictional amount) rather than a libel in Admiralty, in a cause arising out of a maritime tort.

2. Whether the Court below destroyed petitioner's substantive admiralty rights by failing to cure any deemed defective jurisdictional averment in view of knowledge of the ultimate facts pleaded and the evidence introduced, all of which conclusively proved that the cause was within the admiralty jurisdiction.

3. Whether the Court below failed in its duty to lay to rest a rejected principle of law narrowing the sweeping scope of admiralty jurisdiction in not determining the fundamental jurisdictional problem, considering the resultant decision and its destructive inroads upon the accepted admiralty jurisdiction as laid down by Congressional fiat and judicial interpretation.

4. Whether the Court below deprived petitioner of substantive admiralty rights in this maritime tort by ruling that discredited common law principles were applicable with its attendant duty upon the respondent only to warn of latent dangers (rather than to afford a reasonably safe place to work), thus destroying the liberal maritime concept of comparative negligence in mitigation of damages and applying the archaic doctrine of assumption of risk as a complete bar.

Statement of Facts

Peter Holm, fifty-seven years old (4),[1] married (7), with a history of service in the United States Navy (6), and with the Merchant Marine as a Watchman, Oiler and Fireman (8, 9, 10), was the shipkeeper (watchman) and sole person (25) aboard the S.S. "Ayers" (18), an ore boat (35), owned by Great Lakes Steamship Company, laid up for repair in the respondent's shipyard (19). His duties were to set the lines, see that the cables were tight, and to take care of the supplies (14).

Petitioner joined the ship in November, 1954 (18), remained until March 8, 1955, when the accident complained of herein occurred (19). He lived aboard the vessel (36).

The sole means of access to the vessel was a wood and iron gangway (21, 37, 126), 60-70 feet long and four feet wide (130). Attached to a pivot and platform, in turn at-

[1] References are to pages of the Trial Transcript.

tached to the center of the ship (36) and with a pipe rack at the bottom end resting on the dock (128), the gangway was able to move with the surge of the ship (21-22, 128). Consisting of planks running up and down, the gangway had angle iron railings and cleats set across the planks to give surer footing (22). There were no cross members or stays, safety or guard wires between the upper railing and the gangway planks (40), as corroborated by the respondent's employees (102). The top of the gangway was about thirty feet high (32) since the vessel was riding light (13). The "AYERS" was tied up at the pier (24) by cables fore and aft (31).

The gangway, by law part of the vessel, was owned by the respondent (126) and was positioned onto the vessel for the use of those persons having work aboard her and on another vessel lying off shore and lashed to the "AYERS" (25, 116, 119). The one gangway was used from November to the date of the accident (51).

Petitioner testified that the drain holes on the gangway were constantly clogged up (39), that it was very slippery all the time (71), was slippery when it snowed or rained from the time that he joined the ship (55, 56), that the cleats were worn in the places where the men walked (72), and were slippery when the weather was damp (57), that the snow, ice and moisture could not go through to drain off (102). He further stated that he repeatedly requested rock salt for the gangway and the drain holes in order to break up the ice (19, 20, 39, 56) and was told by the foreman that it would be taken care of. It never was (20) except once around Christmas (20-21), though the salt was used in the yard to break up snow and ice (131).

The vessel was in the yard for repair [replacement of part of the wheel and for new plates] (119), as were all the boats (respondent would not permit ships to dock unless there was ample repair work to be done (118-119)) and was to be kept until spring (119). Respondent employed four

hundred men for repair of the vessels (115), who were working on the boats on the accident date (93), all of whom used the one gangway every day, with its resultant considerable wear and tear.

On the morning of March 8, 1955, the day of the accident, the petitioner left the ship (24) returning to the vessel shortly thereafter. At that time he saw frost on the gangway and snow on the deck of the ship (58). The weather was freezing (61). In the late afternoon the petitioner again left the ship to buy some groceries and a magazine (26, 95). He had to sign out and in with the pier gate guard (27) who was approximately two blocks from the ship (26), spoke to him about the weather and the slippery condition of the area (26). There was a light snow that afternoon (76).

When the petitioner returned to the pier gate about 5:45 or 6:00 P. M. (26, 95), he had some bread, eggs, milk, a newspaper and magazine (27) and stopped to talk to the gateman for 25 or 30 minutes (28).

He then proceeded to the vessel and started up the gangway carrying the bundle in his left hand, his right hand on the rail (23). As he reached close to the top of the gangway, walking unhurriedly, he slipped on a worn, slippery cleat (39, 40), hung on with his right hand for a moment and then fell through under the railing where the cross members were missing and which would have stopped him, crashing down to the dock below.

Petitioner came to the next day (41) in the hospital, with fractures of the hip, leg, ribs, pelvis and finger (41). He was discharged to outpatient treatment from the Detroit Marine Hospital in June, 1956 (73), some fifteen months later and was unable to return to work up to the date of trial (44).

During the trial petitioner was denied the opportunity of proving that his presence aboard the vessel and his

duties thereon were for the mutual benefit of both the shipowner and the respondent shipyard (121-123), all of which would have established petitioner's legal position aboard the vessel and gangway, his relationship with the shipowner, and his right to use the gangway in furtherance of his employment.

On the respondent's motion for a directed verdict, based upon a discharge of its duties and petitioner's assumption of risk, the Trial Court dismissed the complaint (147) on the following erroneous grounds:

(a) denying the applicability of admiralty law and principles in the case;

(b) denying that petitioner performed the services for the mutual benefit of his employer and respondent by the simple expedient of rejecting the offer of evidence on the issue;

(c) drawing conclusions of facts, not supported by any evidence, that the gangway involved was not for petitioner's use when it was known by the respondent to be the sole method of access and ingress to and from the vessel for four months;

(d) erroneously concluding that improper maintenance of the gangway could not make the gangway defective;

(e) drawing the conclusion of fact, unsupported by any evidence, that there was a policy of shipkeepers generally to put up and lash a ladder to the ship and not to use the accommodation gangway, although the latter was concededly easier and safer (if properly maintained) to use;

(f) determining that the gangway railing was constructed properly and gave proper protection, though obviously a question of fact for the jury;

(g) applying state common law principles of assumption of risk as the complete bar rather than the principles

of the general maritime law, which would not permit the defense under the circumstances herein;

(h) conceding foreseeability by the respondent that petitioner would use the gangway and then denying that the respondent had any duty to the petitioner other than that to a licensee under state land common law not to entrap him.

Petitioner appealed to the Court below from the order of dismissal and judgment, which Court affirmed the dismissal by the Trial Court on March 23, 1960.

Reasons for Granting the Writ

The decision of the Court below is in direct conflict with four basic concepts of law previously laid down by this Court. Those many decisions by this Honorable Court have been in aid of plaintiffs in personal injury cases who were deprived of their constitutional right to jury trial by Judges who, by refusing to assess an action in the light of modern, liberal, judicial procedure and concept of substantive law, effectively destroyed the claims of persons torn in body and spirit, the unfortunates of our industrial behemoth.

This Court has recently admonished the Courts of Appeals that inroads upon the jury's province would not be tolerated, *Schulz* v. *Pennsylvania*, 350 U. S. 523; *Rogers* v. *Missouri*, 352 U. S. 500; *Ferguson* v. *Moore-McCormack*, 352 U. S. 521; *Webb* v. *Illinois*, 352 U. S. 512; *Arnold* v. *Panhandle*, 353 U. S. 360; *Shaw* v. *Atlantic*, 353 U. S. 920; *Futrelle* v. *Atlantic*, 353 U. S. 920; *Deen* v. *Gulf*, 353 U. S. 925; *Thomson* v. *Texas*, 353 U. S. 926; *Ringhiser* v. *Chesapeake*, 354 U. S. 901; *Gibson* v. *Thompson*, 355 U. S. 18; *Stinson* v. *Atlantic*, 355 U. S. 62; *Honeycutt* v. *Wabash*, 355 U. S. 424; *Butler* v. *Whiteman*, 356 U. S. 271. See also: Chief Judge Clark's dissenting opinion in *Filipek* v. *Moore-McCormack*, 258 F. 2d 734 (2nd Circuit).

This matter is of national importance not only because of the denial of the effect of those many decisions of this Court but additionally because of the increased tendency of the Courts below to "clear the calendars" of the backlog of thousands of personal injury cases in the various Courts throughout the United States. Injured persons, constituting a substantial proportion of litigants, are of national importance if only because of sheer weight of numbers. Any decision which affects them as a class carries with it a burden affecting thousands.

Aside from destroying the case on the basis of determining questions of fact, from the record and without, in order to obliterate the jury's function, the Trial Court below concluded that petitioner's complaint was not predicated upon a maritime tort, but was to be decided "practically under real estate law" (p. 137) and whether he (petitioner) was a licensee or invitee on their (respondent's) so-called "gangway or ramp" (p. 137).

The Court, in its continuing discussion of respondent's motion for a directed verdict, determined eight issues of fact [2] and then came to the conclusion that since nothing

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[2] The Court erred in making determinations on the following issues of fact:

1. Whether petitioner was performing work which would benefit respondent as well as petitioner's employer (137, 138);

2. Whether petitioner was permitted to and was expected to use the gangway in question by reason of the acquiescence of respondent and the foreseeability that he would do so (138, 146, 147);

3. Whether the gangway was defective by reason of improper maintenance in permitting the snow, ice and other moisture to remain without proper drainage (138);

4. Whether the gangway was defective by reason of the absence of cross members from the railing to the planks of the gangway (139);

5. Whether the gangway was intended for use by all persons, including petitioner, who came aboard the vessel in order to perform duties thereon (139, 140);

was left for the jury's consideration the motion should be granted.

In so doing the Trial Court incorrectly applied state law of Ohio with its archaic common law doctrines of assumption of risk, etc. to this admittedly maritime tort ("* * * we have the case of a man who was hurt in connection with a boat.") (p. 137), rejecting the contention that either statutory or not statutory maritime law was applicable ("we are not here under the Jones Act [3] and we are not here under admiralty.") (p. 137).

The Court of Appeals, seemingly reaching in an effort to sustain the dismissal, erred on four basic propositions of law, error which, if permitted to stand, will give rise to continued attempts to emasculate the sweeping scope of admiralty jurisdiction and doctrine.

1. Determined, erroneously, that filing a complaint, having requisite diversity of citizenship and jurisdictional amount (in order to obtain a jury trial), instead of a libel subjected petitioner to Ohio common law rather than general maritime law principles in an action arising out of a maritime tort. The decision violated the very fundamental ruling of this Court in *Pope & Talbot* v. *Hawn*, 346 U. S. 406, wherein this Court stated:

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6. Whether the fact that there was no evidence submitted of previous accidents on the gangway negated the possibility of respondent's negligence in its design and maintenance of the gangway (142);

7. Whether petitioner assumed the risk of the defective gangway by reason of his prior use of it (142, 143);

8. Whether petitioner's use of the gangway rather than possibly putting up a special ladder for his use was an assumption of the risk, considering the fact that he had to carry supplies by hand aboard the vessel for his subsistence (144).

[3] Admittedly not, since Holm was not a crewmember and suit was not brought against his employer.

"Another argument is that Pennsylvania law must govern here because the District Court's jurisdiction was rested on diversity of citizenship under 28 U. S. C. § 1332. For this contention the principle established in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, is invoked. That case decided that federal district diversity courts must try state created causes of action in accordance with state laws. This ended a long-standing federal court practice under which the outcome of lawsuits to enforce state created causes of action often depended on whether they were tried in a state courthouse or a federal courthouse. *Erie R. Co.* v. *Tompkins* was thus designed to ensure that litigants with the same kind of case would have their rights measured by the same legal standards of liability. It appears to be contended here, however, that one injured on navigable waters who sues in federal court under diversity jurisdiction somehow jeopardizes his right to have as full a recovery as he otherwise would. It is certainly contended that one who sues on the 'law side' of the docket has much less chance to recover than one who sues on the 'admiralty side'. Thus we are asked to use the *Erie-Tompkins* case to bring about the same kind of unfairness it was designed to end. Once again, the substantial rights of parties would depend on which courthouse, or even on which 'side' of the same courthouse, a lawyer might guess to be in the best interests of his client. We decline to depart from the principle of equal justice embodied in the *Erie-Tompkins* doctrine. Of course the substantial rights of an injured person are not to be determined differently whether his case is labelled 'law side' or 'admiralty side' on a district court's docket. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 88-89. The District Court and Court of Appeals correctly refused to deny Hawn's federal right of recovery by applying the Pennsylvania contributory negligence rule" (pp. 410-411).

See also: *McAllister* v. *Magnolia*, 357 U. S. 221, concurring opinion of Mr. Justice Brennan; *Canella* v. *Lykes*, 174 F. 2d 794; *Troupe* v. *Chicago*, 234 F. 2d 253; *Oroz* v.

American, 259 F. 2d 636, all of which rejected the contention that, having diversity of citizenship and the requisite amount involved, no admiralty jurisdiction existed when a complaint was filed in a suit arising out of a maritime tort.

Admiralty jurisdiction arose from a determination of the locale of the tortious act. The mere happening of an accident in navigable waters sufficed to give rise to maritime principles. *Kermarec v. Compagnie*, 358 U. S. 625; *Pennsylvania v. O'Rourk*, 344 U. S. 334; *The Plymouth*, 3 Wall. 20; *Philadelphia v. Philadelphia*, 23 How. 209; *The Commerce*, 1 Black 574; *The Rock Island*, 6 Wall. 213; *The Belfast*, 7 Wall. 624; *Leathers v. Blessing*, 105 U. S. 626; *The Admiral Peoples*, 295 U. S. 649, even if brought in the State Court *Carlisle v. Sandanger*, 259 U. S. 255.

Petitioner respectfully submits that this decision, if permitted to stand, may well corrode the basic principle of uniformity of decision so long a part of maritime principle that locale of the tort determined the applicable law, not the chosen side of the Courthouse.

2. The facts of the case establishing the accident as one which occurred on the gangway of the ship, hence within the maritime jurisdiction, were fully set forth in the complaint, paragraphs 3, 4 and 5:

> "Third: Plaintiff says that on or about the 8th day of March, 1955, at or about 7:00 o'clock P. M., while he was proceeding to the Steamer J. Burton Ayers, which was berthed at the defendant's dock at Lorain, Ohio, and while he was employed as a seaman on board said vessel, and proceeding along a slippery, worn, defective, broken gangway, which was the only means of egress to said vessel, suddenly, and unexpectedly he was caused to slip and fall through the unprotected and dangerous side of said ramp, causing him to fall a distance of approximately 30 feet. That he sustained severe injuries hereinafter more particularly set forth.

Plaintiff says that at the aforesaid time and place there was not sufficient illumination provided.

Fourth: That on the day and date aforesaid, the defendant was the owner of said dock area where the plaintiff was injured, and that the maintenance and control of said dock and gangway was under the direct control and supervision of the defendant.

Further that the defendant had actual and constructive knowledge that said area was being used by the Great Lakes Steamship Company, Inc. as a place to berth its vessels, and that the defendant knew or should have known that seamen, employed by The Great Lakes Steamship Company, Inc. on their vessels, berthed at this dock, would have to use this area as a means of entrance to their vessels and as a means of exit also. Further that the defendants, its agents, servants, and employees had actual and constructive notice of the dangerous condition of the dock area, and in particular the gangway where the plaintiff fell, but that they continued to allow and invite employees of the Great Lakes Steamship Company, Inc., working on the Steamer J. Burton Ayers, to use said area as a means of entrance to their vessel, when they were well aware of this dangerous condition.

Fifth: That in violation of the duties and obligations imposed upon the defendant by the State of Ohio, Ordinances of the City of Lorain, Ohio, and the rules of common law, the defendant by its agents, servants, workmen and employees, was careless and negligent:

(a) in negligently and carelessly failing to construct a proper protective guard railing on the sides of said gangway,

(b) in failing and neglecting to give proper notice to the employees of the Great Lakes Steamship Company, Inc., working on the Steamer J. Burton Ayers, at the aforesaid time and place of the existence in that area of this dangerous condition,

> (c) in negligently and carelessly inviting and allowing the employees of the Great Lakes Steamship Company, Inc., particularly this plaintiff, to use said area, when the defendant had actual and constructive knowledge or knew or should have known of the slippery and worn condition of the gangway and also of the makeshift and improperly illuminated rails on the side of said gangway."

The Court's conclusion that the principles of law to be applied were those of the common law was not grounded upon the language of the complaint but rather was based upon examination of the complaint, a rejection of admittedly inartistic language, appreciation of the facts alleging a maritime tort and a deliberate and considered (and erroneous) opinion that state real estate law was applicable. Any contention that the Trial Court was either misled or was not properly apprised of petitioner's contention is not supported by the record. The Trial Judge quite obviously considered the possibility that this cause came within admiralty principles and expressly rejected it. What more could petitioner do; what more should he have done!

An issue on appeal is properly preserved when a party has made known his position to an order or ruling of a Trial Judge and the Court knows the grounds of the objection. Rule 46 of the Federal Rules of Civil Procedure; *Troupe* v. *Chicago*, 234 F. 2d 253. The Trial Court, having full knowledge of the facts, the duty of the Court to determine the matter upon the proper jurisdictional basis was inescapable.

There was and is no change of theory by petitioner. A maritime tort was certainly pleaded as the ultimate fact set forth in the complaint, was amply supported by the evidence, was fully considered and rejected by the Trial

Judge on respondent's motion, duly excepted to, and was raised again on appeal before the Sixth Circuit. With knowledge of the facts alleged in the complaint and established by the evidence the Court below certainly had the power, and indeed the responsibility, to examine the whole record and establish the correct jurisdictional basis of the suit by curing any deemed defective averment of jurisdiction. *Sun* v. *Publishing*, 194 U. S. 377; *Troupe* v. *Chicago*, 234 F. 2d 253. As such, the decision of the Court below appears to be contrary to the decisions above cited and to the now settled principle of law laid down by this Court in *Taylor* v. *Hickman*, 329 U. S. 495, at page 501, that a complaint under the Federal Rules of Civil Procedure need be only "general notice-giving" to the wrongdoer with a minimum of facts to state the nature of the claim.[4]

Petitioner submits that the decision of the Court below is alarming because of its return to the narrow, long discarded and discredited common law concept of pleading that would demand from an injured party the onerous burden of immediately setting forth and forever strictly adhering to any ultimate facts and applicable law pleaded, without possibility of subsequent modification resulting from the extensive pre-trial and discovery procedure consistently advanced by this Court as proper and equitable.

3. While the Trial Court rejected the applicability of maritime principles, the Court below would not pass on the subject in binding petitioner to common law negligence concepts. Petitioner submits that admiralty principles do indeed apply in this cause arising out of a maritime tort.

The gangway leading to a ship has always been considered an appurtenance thereof. Since *The Admiral Peoples*, 295 U. S. 649, all Courts, without exception, have agreed

[4] Actions of counsel harmful to the client cannot bind the client if the Court or opposing counsel are not misled. *Dixon* v. *United States*, 219 F. 2d 10.

that an accident on the gangway of a ship came within the admiralty jurisdiction, subjecting the parties to the principles of maritime law solely by virtue of its locale. See also: *Brady* v. *Roosevelt*, 317 U. S. 575; *Vancouver* v. *Rice*, 288 U. S. 445; *Grillo* v. *Royal*, 139 F. 2d 237; *Radoslovich* v. *Navigazione*, 72 F. 2d 367; *The No. 34*, 25 F. 2d 602; *Standard* v. *Robins*, 32 F. 2d 182.

While not expressly rejecting the applicability of admiralty jurisdiction, the overall view by the Court below in the context of its decision could and may well be interpreted as an application of common-law principles in this matter.[5]

As such, to reverse the possible extension of common law principles in matter of maritime torts, petitioner respectfully submits that the cause be reviewed and be declared anew to be within the admiralty jurisdiction and not subject to the anachronisms of the common law.

4. The question of whether petitioner was entitled to a safe place to work under maritime principles rather than only to be the recipient of a warning of latent defects known to the owner has been discussed on many occasions in the effort to distinguish and discard the confusing and now largely discredited common law doctrine of assumption of risk.

The decision of the Court below has created a spectre of a return to that very law which this Court and the several Courts of Appeals have consistently rejected as inapplicable in the maritime setting.

In *Pope & Talbot* v. *Hawn*, 346 U. S. 406, at pages 408-410, this Court apparently settled this very issue in re-

[5] Failure of the Court to give credence to the substance rather than the form of the suit may not be recalled by other courts in the sometimes overzealous attempts to cite controlling authority.

jecting the contention that state law governed by common law doctrine could ever control a cause of action arising out of a maritime tort. While the discussion in the *Hawn* case centered about the doctrine of contributory negligence, the same fallacious argument of state law supremacy has now been upheld by the Court below.

The rule that the duty of respondent to provide a reasonably safe place to work was terminated with its warning of latent defects (which the Court below held to be unnecessary as being patent) was one of common law assumption of the risk by a workman of known defects rather than a "no duty" rule of law. The defense was unavailable in this cause of action applying maritime principles. Perhaps in a land accident in which the archaic (and discredited) doctrine was in full bloom an obvious defect would have ended the duty to further act, but where knowledge by the worker of the defect did not obliterate liability, the owner cannot rely upon such knowledge to sustain its primary burden of providing reasonable safety. Thus—while the duty of an owner under both land and maritime principles may rest primarily upon proof of notice of the defective condition, either actual or constructive, the question of defenses available to that owner constitutes a prime difference between the two systems of law.

Guerrini v. *United States*, 167 F. 2d 352, involved an action by the employee of a subcontractor who slipped in oil on the deck of the ship in a yard for general overhaul. The District Court had held that the owner had not surrendered control of the ship.

The Appellate Court then held that state law was applicable (the case was decided prior to *Pope & Talbot* v. *Hawn, supra; Halecki* v. *United*, 251 F. 2d 708, and other recent cases holding that maritime principles would apply), that under New York law the duty to the libellant was the same as that of employer to employee. Thus—the Court

defined the basic distinction between the mere duty to warn of latent defects and the affirmative duty to provide reasonable safety.

The Court further expressed the thought that the duty only to warn was actually predicated upon the common law doctrine of assumption of risk as a complete bar and that the lack of the defense in admiralty created a continuing duty beyond the common law veil. In holding that the shipowner's duty went further than merely to warn, the Court stated:

> "As we said in that case, the New York decisions appear not to distinguish the measure of care due to a 'business guest' from that due from his employer to an employee; and, if so, a failure to use reasonable care to provide for the 'guest's' safety is a breach of duty, even though the danger be apparent. At times opinions have read as though the duty was limited to pointing out the dangers and not including any affirmative provision for the safety of the 'guest' while on the premises. It is not surprising that this ambiguity should arise, because practically it makes no difference, since even though the owner's duty be the broad one, contributory negligence or assumption of risk is an absolute bar. However, in a suit in the admiralty the distinction becomes important, because if the shipowner owes a positive duty to provide a safe place, regardless of the openness of the danger, the 'guest's' contributory negligence is not a bar, but only goes in mitigation of damages. This is as true when no statute provides as when one does. Moreover, whether the defence is total or partial, depends upon the forum. Being therefore obliged to decide whether in New York the duty goes beyond warning the 'guest' of any dangers, we hold that the more common expression is authoritative, and that the duty is the same as that of employer to employee" (pp. 355-356).

Gindville v. *American*, 224 F. 2d 746, involving a longshoreman injured while unloading the vessel, suit for both

negligence and unseaworthiness was brought for stowing cargo in an unsafe manner. Affirming the plaintiff's verdict, the Third Circuit stated:

> "The suit was based, first, upon alleged negligence of the defendant in the manner of loading the cargo and, secondly, upon a charge of unseaworthiness because of the unsafe manner in which the cargo was stowed. The defendant asserts broadly that our decision in Bruszewski v. Isthmian S. S. Co., 1947, 163 F. 2d 720, 1948, certiorari denied 333 U. S. 828, 68 S. Ct. 451, 92 L. Ed. 1113, settles this case in its favor, arguing that the danger, if any, was perfectly apparent and that the plaintiff assumed the risk when he went to work in the face of such apparent danger. We think the Bruszewski case does not stand for any such sweeping proposition as this. Indeed, it is quite narrow. It means no more than if a carpenter is called in to repair a hole in a roof he cannot complain that a roof with a hole in it is an unsafe place to work. Nor do we think that it is fair to characterize the difference between Bruszewski and Gindville as a mere matter of semantics. Gindville did not come to repair any condition. He came to help unload a cargo. If the difference is not apparent further discussion will not make it so" (p. 747).

Again in *Klimaszewski* v. *Pacific*, 246 F. 2d 875, a longshoreman was injured during the loading operation caused by slippage of a winch cable.

> "The appellant complains about the court's instruction on assumption of risk. This question need not trouble us either. As in Gindville, we say here that one need only refer back to Socony-Vacuum Oil Co. v. Smith, 1939, 305 U. S. 424, 59 S. Ct. 262, 83 L. Ed. 265, to get the rule with regard to the application of the doctrines of assumption of risk and contributory negligence in a maritime case. The extension of the rule stated in the Socony-Vacuum

case to longshoremen is shown in Pope & Talbot, Inc. v. Hawn, 1953, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143, and the Gindville case, supra. The new decision of the Sixth Circuit in Imperial Oil, Ltd. v. Drlik, 234 F. 2d 4, certiorari denied, 1956, 352 P. S. 941, 77 S. Ct. 261, 1 L. Ed. 2d 236, is squarely in point with just about every issue raised in this case. *A longshoreman does not assume the risk of negligence or unseaworthiness and this is so whether his action is based on negligence or unseaworthiness*" (p. 877). (Italics ours.)

In *LaGuerra v. Brasileiro*, 124 F. 2d 553, *supra*, the Court further pointed out that the concurrent responsibility of the stevedore to his employees did not avoid the shipowner's negligence; that the negligent order by the stevedore to continue work in the face of the known danger was not an assumption of the risk as a matter of law since the sole choice was loss of the job. The Court therein held that the question was one of fact for determination by the District Court:

"The trial court combined this factor of the nature of the bulkhead with an observation on the skilled nature of stevedoring. Even assuming the responsibility of stevedoring companies towards their employees, and assuming that here the employer was negligent towards plaintiff because the hatch boss required him to continue working under dangerous circumstances, the negligence of the ship was not avoided. Both could be concurrently negligent. Ford v. Allan Line S. S. Co., 227 Mass. 109, 116 N. E. 505; see Deserant v. Cerillos Coal R. Co., 178 U. S. 409, 420, 20 S. Ct. 967, 44 L. Ed. 1127. Certainly we cannot say the command of the hatch boss to continue work was an intervening cause such as to destroy the chain of events.

If the element of the hatch boss's control over the stevedores is to have any bearing, it must be in relation to the question of contributory negligence of plaintiff. This was clearly a question for the jury. In view of the speed of work in unloading, the deci-

> sion of the hatch boss to have the cargo lashed, the fact that the more obviously dangerous bags had been removed, and the order to continue work, we cannot say as a matter of law that plaintiff should have stopped work and risked losing his job in order to avoid the chance that he would be injured. Under the circumstances the jury might not unreasonably conclude that continuance at work was a justifiable exercise of judgment on the plaintiff's part" (p. 555).

In *Troupe* v. *Chicago*, 234 F. 2d 253; *supra*, the Court held that the injured seaman was entitled to her cause of action, both for negligence and unseaworthiness, even when "she admitted that she had used the same and identical steps many times over six previous seasons and that she had safely negotiated them several times on the day of the accident" (p. 256).

The Court below failed to accept the settled concept that there can be no assumption of risk in absence of voluntary choice of safe or unsafe equipment or manner of performance of work, *Palermo* v. *Luckenbach*, 355 U. S. 20. Nor does continuation of work in the face of lack of proper or safe equipment give rise to the defense. *New Berne*, 89 F. 2d 244; *LaGuerra* v. *Brasileiro*, 124 F. 2d 553, *supra*.

Petitioner submits that failure of this Court to review this issue may presage a return to the common law doctrine of duty upon the owner only to warn of latent defects. As stated in *Guerrini* v. *United States*, 167 F. 2d 352, the so-called "no-duty" rule of the owner was nothing more than the recognized common law rule of assumption of risk as a complete bar, a discredited rule of law contrary to basic maritime doctrine. As such, the decision of the Court below will serve to shift the burden of proof of that defense to the plaintiff in an attempt to prove plaintiff's lack of knowledge of the defect, necessary to avoid dilution of the defendant's primary duty under settled principles of maritime law to provide a reasonably safe place to work.

The shift of that burden to injured plaintiffs in the maritime industries must affect every litigant and will strike a fundamental blow to recognized liberal admiralty principle and procedure. Petitioner respectfully submits that the decision of the Court of Appeals should now be reviewed in order to re-establish the uniformity of decision laid down by this Honorable Court.

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of this petition.

Dated: June 20, 1960.

Respectfully submitted,

S. Eldridge Sampliner,
Counsel for Petitioner,

Goldstein & Sterenfeld,
Victor G. Hanson,
of Counsel.

Harvey Goldstein,
On the Brief.

APPENDIX

Opinion of the United States Court of Appeals For the Sixth Circuit

No. 13,856

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

—o—

PETER HOLM,

Appellant,

—v.—

AMERICAN SHIP BUILDING COMPANY,

Appellee.

—o—

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

Decided March 23, 1960

Before:

SIMONS, *Senior Judge*, POPE, *Circuit Judge*, and KENT, *District Judge*.

SIMONS, Senior Judge:

The appellant was employed by the Great Lakes Steamship Company as a shipkeeper of the "S.S. Ayers", which was laid up at a dock in the appellee's shipyard in Lorain, Ohio, undergoing repair. The appellant lived on the vessel. In the afternoon of March 8, 1955, he slipped from a wet gangplank, while returning to the ship with groceries, and

was severely injured. He brought this action against the shipbuilding company alleging negligence of the appellee under the laws of "the State of Ohio, Ordinances of the City of Lorain, Ohio, and rules of the common law". The negligence charged was failure to supply a proper guard rail or to give notice of the dangerous condition of the gangway. At the conclusion of the plaintiff's case, the court directed a verdict for the defendant, stating that the case involved Ohio law and that the defendant had fulfilled its duty not to entrap the plaintiff by failure to notify him of the slippery condition of the gangway. He challenges the judgment on the ground that the Court should have applied admiralty law and that it was error to direct a verdict.

The primary question before us is whether the appellant having brought his suit under the law of Ohio by filing a complaint instead of a libel, and having tried the case as a conventional tort action without urging any applicable principle of maritime law, may now completely change his theory upon review and so seek in this court a reversal on the ground that admiralty law controlled adjudication. We may assume, arguendo, without so holding, that admiralty jurisdiction extended to the appellant's injury because received on a vessel in navigable waters. The plaintiff asserts jurisdiction under the doctrine of *The Admiralty Peoples*, 295 U. S. 649, and *Brady* v. *Roosevelt S. S. Company*, 317 U. S. 575. We are, however, constrained to hold, upon cumulative authority, that this theory of the case cannot be raised for the first time upon appeal. *Walker* v. *Felmont Oil Corp.*, 262 F. 2d 163 (6th Cir.); *Reliford* v. *Eastern Coal Corp.*, 260 F. 2d 447 (6th Cir.); *Corbin* v. *B. & O. R. Co.*, 234 F. 2d 78 (6th Cir.); *Curd* v. *Todd-Johnson Dry Dock*, 213 F. 2d 864 (5th Cir.); *Chicago & Eastern Ill. R. Co.* v. *Southern Ry. Co.*, 261 F. 2d 394 (7th Cir.); *Union Pacific Railroad Co.* v. *Johnson*, 249 F. 2d 674 (9th Cir.). In the Corbin case, *supra*, at p. 81, the Court said: "The theory upon which the case was submitted and argued in the District Court cannot, when an adverse judgment results, be discarded and a new, con-

tradictory theory be substituted and successfully invoked on appeal." This is, likewise, the rule in the Supreme Court. *Virginia Ry.* v. *Mullens*, 271 U. S. 220; *Van Huffel* v. *Harkelrode*, 284 U. S. 225. The latest word upon the rule derives from *Thomas W. Nelson and Arthur Globe* v. *County of Los Angeles*, — U. S. —, announced February 29, 1960, wherein it was said: "We do not pass upon petitioners' contention as to the Privileges and Immunities Clause of the Fourteenth Amendment since it was neither raised in nor considered by the California courts."

So, viewing the plaintiff's failure to present a case under the admiralty law, what we have left is an ordinary tort action based upon alleged negligence of the defendant. Whether the plaintiff was a licensee or invitee, need give us little concern. In either status, it was necessary for the plaintiff to prove negligence and its proximate relation to the injury which followed. He knew the gangplank was not in good condition, in that the cleats were worn and would become slippery when the weather was damp. He so testified and also testified that from time to time he actually did slip upon the gangway. Since, under Ohio law, recovery in this type of action is based upon lack of knowledge on the part of the plaintiff as to the dangerous condition, the evidence would not sustain a verdict for the plaintiff. Nor was the defendant obliged to notify him of a hazard of which he was fully aware. "It is only when there are perils or dangers known to the owner, and not known to the person injured, that liability may be established and recovery permitted." *Engelhardt* v. *Philipps*, 136 O. S. 73, 78; *Davis* v. *Shutrump Co.*, 140 O. S. 89. This court has defined Ohio law in conformity with these precedents. See *Creasy* v. *Ohio Power Co.*, 248 F. 2d 745; *Ford Motor Company* v. *Tomlinson*, 229 F. 2d 873. Since there was no obligation to caution the plaintiff about something which he knew, there was no error in directing a verdict for the defendant. Wherefore, the judgment is

Affirmed.

Opinion of the District Court

The Court: Gentlemen, while we have the case of a man who was hurt in connection with a boat, we are not here under the Jones Act and we are not here under admiralty. We are here practically under real estate law, because we get down to a question of what Mr. Holm is to the American Ship Building Company, and whether he is a licensee or invitee on their so-called gangway or ramp.

Now, as counsel for the plaintiff says, we must give the plaintiff's evidence the most favorable interpretation it can possibly receive. There is not any question about that. But let's go into what the plaintiff claims with reference to what the American Ship Building Company did to him, because he said they were negligent towards him.

He worked for the Burton Ayers, he was ship keeper for that boat. He was not an employee of the American Ship Building Company. He worked only for the ore vessel which was tied up at a dock of the American Ship Building Company and which had been apparently tied up there all winter, since along about Thanksgiving Day. He had worked that year on some other boat in some other capacity and chose to be ship keeper during the winter time, and had been keeping this ship for some months before he was hurt.

Now the American Ship Building Company, as the evidence indicates, was in the business of repairing ships. They invited the Burton Ayers to come in and berth at their dock so they could do whatever repairs they were undertaking on that boat. Mr. Holm was not working for them. They attached this ramp to the Burton Ayers for the purpose of having only their own employees use it to go up on the Ayers, and then they attached another ramp of some kind between the Ayers and the boat berthed alongside of it, so that their employees could go across the Burton Ayers onto the attached other ship to make further repairs, because apparently they had more ships than they had docks, I mean ships for the purpose of repair only.

Now, it is the claim of the plaintiff that he fell on a slippery, worn, defective, broken gangway. Was it slippery? He says so. Was it worn? He says so. Was it defective? There is no proof of that. Was it broken? There is no proof of that. So we have his say-so that it was slippery and worn.

Now he says that he fell through the unprotected and dangerous side of the ramp, causing him to fall a certain distance. He said it was the only means of ingress and egress to and from said vessel. At any rate he was trying to get on the vessel at this time. He testified he got up in the morning, went up the street to get a newspaper and other things, noticed how slippery things were, and noticed how bad the ramp was on the occasion of his visit up the street in the morning, but from the evidence before us in the form of a log sheet, it shows he didn't go up the street that morning at all. How he came to give that testimony I wouldn't undertake to say.

He says this ramp was the only means of getting on and off the boat and he would have to use this as a means of entry. I do not find such to be the case at all. This particular attachment or ramp, or gang plank, four feet wide and sixty feet long, was a great convenience to him, although it was not put there for his use at all. It was put there for the use of the employees of the American Ship Building Company in going up on the Ayers and the sister ship for the purpose of making repairs.

It is the custom of ship tenders, these men who look after ships in the winter time, to put up their own ladder and lash it and use it.

It is only on rare occasions anybody puts such a luxurious attachment as this on the side of the ship. That wasn't intended for the use of the crew of the Ayers at all. It was intended for the American Ship Building Company for the benefit of its own men going up there, carrying up there the tools and parts, whatever they could take in that manner. Although there is some evidence when a real heavy thing had to go up it would be lifted by a winch or

the crane. So he wasn't limited to this at all but it was much more convenient to use it than to put up his own ladder, much easier to walk down, and much easier to walk up than to climb up a ladder. Here is an attachment four feet wide and if he was carrying packages he could hug the railing going up there, but whatever the reason, I don't know the reason, he tumbled through and fell off.

From the legal viewpoint the question is what is the responsibility of the American Ship Building Company towards him? Well, his own ship had none towards him because apparently he was paid off under the Longshoremen's Act, and he was paid whatever he could have received through his membership in the ship's crew. I should not have said as one of the ship's crew but through his being one who attended the ship for the winter. So somebody got the idea of suing somebody else and this suit was brought.

Now the claims of negligence are, that "In violation of the duties and obligations imposed upon the defendant by the State of Ohio"—I don't know what that would be except the necessity of using ordinary care— "ordinances of the City of Lorain, Ohio"—which is completely beyond my understanding. There has been no evidence Lorain ever passed any ordinance having to do with this situation. —"and the rules of common law" which apply under the doctrine of negligence. It is claimed under all these rules certain acts of negligence have been committed towards the plaintiff. Now in what respect? "In negligently and carelessly failing to construct a proper protective guard rail on the sides of said gangway."

Apparently it did. This man used it all winter. He never fell off before. I don't know why he fell this time. Apparently all the other people that had to use it every day in coming and going and making repairs on two ships had no trouble. To look at it, it is a stairway, except they

use cleats instead of steps, because it was on such an angle they had to. I see nothing wrong with the construction of this gangway, so-called. And it obviously does have a proper protective guard rail on its sides.

Now, if they have to give notice to this gentleman about the dangerous condition, who knew any more about it than he did? He is using it to go and get papers he never went to get. He said he used it that morning and the record shows he never used it, at least he was never on it to the point he went past the gate to buy newspapers he didn't buy. But he did, at 3:30 in the afternoon, go down the ramp, go up the street and return to the Ayers later, along about 5:30, and the guard, making his rounds later came upon him in a prone position on the ground near the ramp.

Now, from all the circumstantial evidence in the case it looks as if he fell off the ramp at a certain point. Why, nobdy knows. However it happened he was using the ramp, either as a licensee or invitee of the American Ship Building Company. He knew more about the ramp than they did. By his appropriating their ramp as his ramp it almost became part of the structure leading to his own home. He knew more about it than they did. There wasn't any defect there he didn't have more knowledge of than the American Ship Building Company. So, knowing all about it, he certainly assumed the risk.

We are here concerned, really, with real estate law. We have to forget there is a ship here. We have to forget there is a dock here, and we have to talk about it as if it was real estate which Mr. Holm walked across there. Mr. Holm was taking a short-cut to his house. He walked across somebody else's lot, because he found that convenient. He could have walked all the way around the corner. He could have stayed on his own property, just like he could have used his own ladder. He decided for his own convenience to use this way of going aboard on somebody else's property, in the winter time, when ice does form and rain does create moisture and does attach itself

to the ground. If he was walking on a neighbor's lot over which he had been going for four months, and fell on a little ice and came down to the courthouse and said, "I am suing my neighbor because I fell on his lot, he ought to have known I walked across it, he ought to have gotten the ice off the lot"—then everybody in the courthouse would laugh at him. And that's the position we have here, although we know it is a very serious business because he was badly hurt.

The first question is, whose fault is it? I do not see, on a fair analysis of the case, taking everything the plaintiff says as true, how, as a matter of law, it is anybody's fault but his own. He decided to use the ramp. I can understand why he would. It was a wonderful convenience. But if he didn't want to assume the risk of injury all he had to do was use his own ladder. That would have been harder than walking up the luxurious ramp which happened to be attached to the front of the vessel, which to all intents and purposes looks like a gang plank of a passenger ship, four feet wide. He would have liked it to have been in better condition. He was the one using it, and he surely knew if it wasn't right, and he chose to use it. Having chosen to use it he now claims somebody else should have told him about the ice on there. He is the last one who looked at it. He says someone else should have kept it dry. He is the last one walked on it. He says he asked for salt that morning. The testimony is that he didn't go near the guard at the gate that morning, as the record shows. But assuming the truth of that, assuming he asked for it, is just asking for salt going to cure a bad condition which he can see, and on which he chooses to walk? If he knew about it all the time, he can hardly be heard to say he didn't see the danger. He used this ramp more frequently than anybody did. He just walked across it two hours before when he left at 3:30 preparatory to his return at 5:30. It looks from this circumstantial evidence in the case he fell from the ramp when he was eight or ten feet from

the top, because that's where the magazine was found that the guard had returned to him. It looks like he had not entered the ship, he didn't go up to the deck and come back because he was still carrying the eggs which he had purchased at the store, which were found in a broken condition when he fell. So he did fall from a point eight or ten feet from the top. No one can tell when he did that.

It wasn't the only means of ingress, it was the most convenient because it was easier for him to let somebody else supply it than to walk up a ladder. It was easier for him to walk straight up the ramp, which resembles a stairway than using a ladder to his own ship, which he, as ship keeper, should have put up between the boat and the dock, which he didn't put up because he found the appurtenances of this defendant company were convenient. No one blames him for using it. Anyone else would have used it under the same conditions. The question is, what is the legal responsibility of its owner if he decides to appropriate its use for his own convenience? And the answer is they have no more responsibility to him than a landlord or owner of property would have to a licensee. They would have the responsibility to him to not entrap him, not to leave a pit in which one could fall in the dark. They would have the responsibility to let him know if there was a cave under any part of the property and they knew it, as they would have to tell even a stranger, "Don't go back there or you will fall in." They would have had to warn him not to enter the property. There is no such situation here. He knew everything about the situation anyone could have known and he chose for his own convenience to assume the risk and he did assume the risk, and in law he has no claim whatsoever against this defendant.

I grant the motion and dismiss the action over the exception of the plaintiff.

Will there by anything else, gentlemen?

Mr. Landskroner: Note our exception.

Order

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action No. 23,453

(Filed February 12, 1959)

[SAME TITLE]

This cause came on for trial on the 9th day of February, 1959, and the Court having heard the plaintiff's evidence, and the defendant having moved the Court at the close of the plaintiff's evidence to dismiss the action upon the ground that on the facts and law the plaintiff has shown no right to relief, and the Court being of the opinion that the defendant's motion is well taken, it is ordered that the action be dismissed for failure of proof, and that judgment be entered for defendant, with costs.

/s/ JAMES C. CONNELL,
Judge.

Dated: ..... 1959.

Judgment

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 166.

PETER HOLM,

Petitioner,

against

THE AMERICAN SHIP BUILDING COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPENDIX.

THOMAS V. KOYKKA,
1144 Union Commerce Building,
Cleveland 14, Ohio,
Counsel for Respondent.

ROBERT G. McCREARY, JR.,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 166.

PETER HOLM,

Petitioner,

against

THE AMERICAN SHIP BUILDING COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPENDIX.

JURISDICTION.

The statement of jurisdiction contained in the petition (p. 2) is accurate except for the description of the action brought in the District Court.

The action was a civil action to recover damages for personal injury based upon alleged negligence under the laws of the State of Ohio, Ordinances of the City of Lorain, Ohio, and the rules of the common law.

QUESTION PRESENTED.

The statement of questions presented contained in the petition (p. 2) does not reflect at all the issue raised by the Court of Appeals' decision. We believe that only a single question is presented for review, as follows:

Did the Court of Appeals abuse its discretion in ruling that Petitioner, having lost his personal injury case on properly decided state grounds, may not for the first time

on appeal be heard to contend that federal law should be applied when, in the trial court, Petitioner expressly invoked and chose state law as the exclusive basis for his alleged right of recovery and at no time invoked federal law?

STATEMENT.

A. The Accident.

Respondent operated a shipyard at Lorain, Ohio. Petitioner was a custodian or shipkeeper (28a) who lived aboard the Steamer AYERS which was out of commission tied up at Respondent's dock. Petitioner was an employee of The Great Lakes Steamship Company, owner of the Steamer AYERS (28a).

Because of weather conditions, practically all Great Lakes vessels are withdrawn from navigation during the winter months. In late November of 1954, the Steamer AYERS was brought to Respondent's shipyard for repairs and winter lay-up, the crew was discharged, and Petitioner came aboard as shipkeeper (15a). He lived aboard by himself from then until March 8, 1955, the date of the accident.

The usual means of ingress and egress to vessels such as the AYERS is a boarding ladder (15a, 28a), consisting of rungs set between two sides of wood as distinguished from a gangway hereinafter described. Such ladders are used by the crew during the navigation season (15a, 5b herein) and also during the winter months when the vessels are laid up (28a).

Such ladders are furnished by the shipowner (15a, 28a) and had been used by Petitioner the previous winter when he had been a shipkeeper (28a).

On the day of the accident, March 8, 1955, the Steamer AYERS was equipped with regular boarding ladders as part of its normal equipment (28a).

However, Petitioner chose to use the shipyard gangway rather than the boarding ladder furnished by his employer (29a).

The gangway (variously referred to at trial as "gangway," "gang plank," "ramp," and "brow") was the property of Respondent (63a), and was erected by Respondent on the dock alongside the AYERS (64a) so that shipyard personnel engaged in making repairs to the Steamer AYERS, as well as to another vessel moored outside the AYERS, could go from the dock to the vessel (19a, 58a, 60a).

Various views of the gangway are shown in plaintiff's Exhibits "1" and "2" and defendant's Exhibit "B", reproduced in the appendix hereto.

The gangway was constructed of a steel framework of heavy angle iron 60′ to 70′ in length (65a) and 4′ wide (65a). It had a protective railing on both sides 30″ to 36″ high (65a). The floor of the gangway consisted of 4 heavy wooden planks running the length of the gangway, to which were spiked wooden cleats spaced at an average footstep apart (65a).

The head of the gangway was bolted by a king pin through a wing pan to a platform and the platform which was also Respondent's property was secured to the side of the vessel at deck level (63a, 64a). No part of the gangway, as distinguished from the platform, was in contact with the vessel (plaintiff's Exhibit "1"), and the foot of the gangway was equipped with a pipe roller (64a), which rested on the concrete surface of the dock (63a).

There were no witnesses to the accident claimed by Petitioner. The log sheet showed that he went out the main gate of the shipyard at 3:40 P. M. and returned at

5:45 P. M. (49a). After passing through the shipyard gate he walked a distance of about two city blocks through the shipyard (19a) and up the gangway, intending to board the AYERS. Before reaching the platform at the head of the gangway, he testified that he slipped, lost his grip on the railing and fell from the gangway (26a, 27a).

One of Respondent's watchmen making his rounds discovered Petitioner lying beneath the gangway at about 8:20 P. M. (56a). An ambulance was at once called and Petitioner was taken to the hospital (52a). The man who discovered Petitioner accompanied him to the hospital and testified that he smelled liquor on him (54a). Petitioner did not put in evidence the hospital admission records.

Petitioner had used Respondent's gangway instead of the ship's boarding ladder at least once a day for the last 3½ months before the accident (29a). He testified the gangway was slippery when wet (32a) and was wet (34a) in the sense that wood attracts moisture (40a) at the time of the accident (36a). There was testimony that the cleats were in good condition (54a) but Petitioner testified that due to use some of the cleats were in a worn condition (32a). He knew of that condition (32a), was familiar with the structural features of the gangway, including the hand-rail (30a), and knew that the gangway became slippery when wet (32a).

At the time of the accident the gangway was well illuminated (5b, 6b herein) and Petitioner testified that he was able to see the cleats and handrails as he went up the ramp and was able to distinguish each and every cleat (42a).

B. Disposition in the Lower Courts.

At the conclusion of the Petitioner's evidence Respondent moved for a directed verdict on the ground that taking the case as presented reasonable minds could not

differ in the conclusion that Respondent had discharged its duties toward Petitioner and that Petitioner was injured under conditions known to him, whereby he assumed the risk.

The motion was argued on both sides upon the stipulation, expressly laid down in Petitioner's complaint (3a, 4a) that recovery was sought under the common law of the State of Ohio.

The trial court granted Respondent's motion stating in effect as follows:

1. Petitioner's evidence must be given the most favorable interpretation it can possibly receive (67a).
2. Respondent's gangway was not the only available means of ingress and egress to the Steamer AYERS (69a, 72a).
3. There was an absence of proof that Respondent failed to construct a proper protective handrail on the sides of the gangway (70a).
4. Because of Petitioner's daily use of the gangway, he had more knowledge concerning it than did Respondent, and this was true whether he was a licensee or an invitee (70a, 71a, 72a).
5. There was an absence of evidence that Respondent knew of some condition which was unknown to Petitioner and which would require Respondent to give warning to Petitioner (73a).

The Court of Appeals unanimously affirmed, holding:

1. The case having been brought under Ohio law and having been tried without asserting any applicable principle of maritime law, Petitioner would not be permitted, upon cumulative authority both in the Courts of Appeal and the Supreme Court of the United States, to raise for the first time on appeal

the theory that admiralty law applied (petition p. 24).

2. Under Ohio law as laid down by the Supreme Court of Ohio and as recognized by the Court of Appeals, Petitioner, whether regarded as a licensee or an invitee, had failed to establish liability, and thus there was no error in directing a verdict for Respondent (petition p. 25).

SUMMARY OF ARGUMENT.

Only a single question is presented for review and no review of that question is warranted. The refusal of the Court of Appeals to consider a theory of Petitioner's case never urged in the trial court and opposed to his theory there advanced was an exercise of discretion in conformity with the practice of other Courts of Appeal and of this Court in regulating appellate procedure. This being the sole basis for the decision below which is sought to be certified, Petitioner fails to present any of the reasons given by Rule 19 of this Court or any other reason for the granting of review.

An additional reason why this Court should not review the exercise of discretion by the Court of Appeals is the fact that even if Petitioner had invoked maritime law in the trial court, that Court would have been constrained by well reasoned authority to have found, just as Petitioner originally urged, that his remedy was governed by the law of Ohio since no maritime claim is here involved.

ARGUMENT.

A. Petitioner expressly relied upon Ohio law in the complaint as the exclusive theory of recovery and urged at the trial that Ohio law be applied to the case.

Petitioner's complaint alleges that he was an invitee of Respondent and the allegations of negligence which were set out in the complaint and relied upon at the trial were as follows:

> "Fifth: That in violation of the duties and obligations imposed upon the defendant by the State of Ohio, ordinances of the City of Lorain, Ohio, and the rules of common law, the defendant by its agents, servants, workmen and employees, was careless and negligent:
>
> (a) In negligently and carelessly failing to construct a proper protective guard railing on the sides of said gangway;
>
> (b) In failing and neglecting to give proper notice to the employees of The Great Lakes Steamship Company, Inc., working on the Steamer J. BURTON AYERS, at the aforesaid time and place of the existence in that area of this dangerous condition,
>
> (c) In negligently and carelessly inviting and allowing the employees of The Great Lakes Steamship Company, Inc., particularly this plaintiff, to use said area when the defendant had actual and constructive knowledge or should have known of the slippery and worn condition of the gangway and also of the makeshift and improperly illuminated rails on the side of said gangway. (3a, 4a)"

This was the theory upon which Petitioner tried the case and the theory upon which Respondent was prepared to defend and the theory upon which each party made the record before the trial court.

Respondent's answer denied negligence and specifically raised the defenses—available under Ohio law—of contributory negligence and assumption of risk. (2b, 3b herein.) At no time did Petitioner move to strike these defenses or argue their inapplicability.

At the end of Petitioner's case Respondent moved for a directed verdict upon the grounds of failure of proof of negligence and assumption of risk under Ohio law. Petitioner argued the motion on the same basis. In granting said motion the Court clearly stated that its ruling rested on Ohio law. (70a). Although Petitioner took a general exception to the granting of said motion (73a), he did not, as required by Rule 46 F. R. C. P. make known to the trial court the **grounds** for objection later urged in the Court of Appeals or in any way suggest to the trial court that maritime principles should apply.

This was the state of the record which prompted the Court of Appeals to find that Petitioner brought this action "against the Ship Building Company alleging negligence of the appellee under the laws of the State of Ohio, Ordinances of the City of Lorain, Ohio, and rules of the common law" and "tried the case as a conventional tort action without urging any applicable principle of maritime law." (petition p. 25.)

Yet, in the face of the record and the express finding by the Court of Appeals that Petitioner **did not** invoke the maritime law in the trial court, Petitioner now makes the unfounded representation to this Court (petition, p. 13) that the trial court was not misled and was "properly apprised of Petitioner's contention" and brazenly asks "What more could Petitioner do?" Petitioner never took the position in the Court of Appeals that he had advised the trial court of his admiralty claim and even now he cites

no reference to the record at all to show the matter was brought to the attention of the trial court. No such reference exists.

In the same irresponsible vein Petitioner asserts (petition p. 9) "The trial court incorrectly applied state law of Ohio * * * rejecting the contention that either statutory or non-statutory maritime law was applicable," but the record fails to show that Petitioner ever made such a contention in the trial court. As was said by this Court in *Dewey v. Des Moines*, 173 U. S. 193 (1899), at p. 200:

> "A point that was never raised cannot be said to have been decided adversely to a party who never set it up or alluded to it."

Petitioner also asserts (petition p. 13) that the trial judge had the duty to determine the matter "upon the proper jurisdictional basis" and (petition, p. 14) that the Court of Appeals had the duty to establish "the correct jurisdictional basis of the suit by curing any deemed defective averment of jurisdiction." But this is sheer pretense—Petitioner knows there was no defect in the jurisdictional averments. The petition itself admits (p. 2) that jurisdiction was rested upon "diversity of citizenship having the requisite jurisdictional amount" and as this was established by the pleadings (1b herein) and proof (9a) there can be no question of the trial court's jurisdiction.

The averment regarding the application of Ohio law went not to jurisdiction but to choice of law as is shown by *Curd v. Todd-Johnson Drydock*, 213 F. 2d 864 (C. A. 5—1954), a case practically on all fours with the present case. Plaintiff was a night mate on a steamer undergoing repairs at a shipyard. While he was descending a ladder from the vessel to the dock he slipped and fell to the dock. The ladder had been constructed and provided by the ship-

yard. Plaintiff brought suit against the shipyard in Federal Court alleging a breach of duty under Louisiana law, where the accident occurred, as the exclusive ground of recovery. The shipyard in its answer denied negligence and affirmatively alleged contributory negligence on the part of plaintiff.

From judgment on a verdict for defendant, plaintiff Curd appealed, assigning as error, among other things, the fact that the Court had charged the jury that contributory negligence would be a complete bar to recovery. In affirming the lower court, the Court of Appeals said, p. 866:

> "Appellant contends that the court committed error in instructing the jury that contributory negligence would be a complete bar to recovery. There was no error in that charge, *because this was a suit under Article 2315 of the LSA-Civil Code*, and the law of Louisiana to that effect was controlling. Vitale v. Checker Cab Co., 166 La. 527, 117 So. 579, 59 A. L. R. 148; Antoine v. Consolidated Vultee Aircraft Corp., La. App., 38 So. 2d 435. This was not an action in which the federal maritime law governed, as in Pope & Talbot v. Hawn, 346 U. S. 406, 74 S. Ct. 202; *it was an action under state law against one who was neither the owner of the ship nor the employer of the appellant.*" (Emphasis added.)

Petitioner also argues (petition p. 14) that the Court of Appeals' ruling thwarts the possibility of amendment of the pleadings "resulting from the extensive pretrial and discovery procedure consistently advanced by this Court as proper and equitable," but Petitioner conceals from this Court the fact that he propounded to Respondent extensive interrogatories—55 **in number**—(not printed), touching upon almost every conceivable aspect of the case, that Respondent answered each interrogatory without objection and that at no time thereafter did Petitioner amend

his pleadings or otherwise assert that he was relying on maritime law.

Petitioner's acquiescence in the trial court's disposition of the case under Ohio law without specific objection as required by Rule 46 puts him in the same position as the plaintiff in the *Curd* case, 213 F. 2d 864 (C. A. 5—1954) *supra,* where it appears that since plaintiff in that case made no specific objection to the charge complained of as required by Rule 51 F. R. C. P., he was not in position to assert such objection on appeal. The Court said,

> "While we recognize the power of an appellante court, in a proper case, to consider on its own motion errors to which no objections were made, such power should be exercised only in exceptional cases and in the interest of justice. Hormel v. Helvering, 312 U. S. 552, 61 S. Ct. 719, 85 L. ed. 1037; Dowell, Inc. v. Jowers, 5 Cir., 166 F. 2d 214, 2 A. L. R. 2d 442. *The purpose of the rule is to prevent a party, after verdict, from taking advantage of the giving of an erroneous instruction to which he failed to call attention in time to enable the court to correct it.* Palmer v. Hoffman, 318 U. S. 109, 63 S. Ct. 477, 87 L. Ed. 645. *By acquiescing in the court's instructions to the jury, the appellant may not now contend that the instructions were erroneous or that the applicable law was not what the court announced it to be.* On the face of the record, there is no plain error that calls for a reversal of the case." (Emphasis added.)

It is thus seen that the facts in the *Curd* case are virtually the same as in the case at bar. We will proceed to show that along with the Court in the *Curd* case and in the case at bar appellate courts follow the rule almost without exception that trial courts are properly confined to the issues raised by the pleadings and urged at the trial.

B. This Court and the Courts of Appeal follow the rule that they will not consider issues raised for the first time on appeal.

Petitioner's appeal was upon the ground that the trial court erroneously failed to apply admiralty law, but the Court of Appeals held, "upon cumulative authority" both in the Courts of Appeal and this Court that this theory of the case could not be asserted on appeal when it had never been raised in the trial court. In support of this rule of appellate practice, the Court cited numerous Courts of Appeal decisions.

The Court of Appeals cited in addition decisions of this Court; in one of which, *Virginia Railway Co. v. Mullens*, 271 U. S. 220 (1926), the Court said at page 227 speaking of the argument that in that particular case there was a contractual obligation to protect plaintiff's interest:

> "But he is not in a position to urge this contention here. The case stated in the complaint was distinctly in tort. There was no mention of a contract obligation * * * the case was treated, in keeping with the complaint, as one to recover damages for an alleged tortious creation and continuance of a nuisance. After bringing and trying the case on that theory the plaintiff cannot be permitted on this review to change to another which *the defendant was not required to meet below.*" (Emphasis added.)

As we will show, the case at bar did not involve a maritime tort at all; yet, in a situation unquestionably involving a maritime tort and where a defendant tardily asserted the application of maritime law, this Court in *Valley Steamship Co. v. Wattaw*, 244 U. S. 202 (1917), applied the same rule limiting the appeal to questions presented below. In that case an action was brought in an Ohio common pleas court alleging that plaintiff, a deck-

hand, on a steamer lying at Sandusky, Ohio, was injured by the shipowner's negligence and that the shipowner, although required to do so, was not a subscriber to the Ohio Workmen's Compensation Act, thereby affording plaintiff by the terms of said Act an action at law and denying defendant any common law defenses. In defense defendant alleged it was not required to subscribe to the Act because engaged in interstate commerce. Judgment upon a verdict for plaintiff was affirmed by the State Court of Appeals and petitions in error and for certiorari were denied by the Supreme Court of Ohio. Writ of error to this Court was sought on the ground (among others) that Article 3, Section 2 of the Constitution extended judicial powers to all cases of admiralty and maritime jurisdiction and thereby rendered the general maritime law not subject to alteration by State law.

This Court dismissed the writ of error for want of jurisdiction on the ground that the question was not properly presented to the trial court. The Court said, 244 U. S. p. 204:

> "The second reason for reversal now set up was not not presented to the trial court in any form. It was not pointed out clearly, if at all, by the petition in error before the Court of Appeals and was not definitely mentioned in the opinion of that court whose powers only extend to a review of the trial court's judgment for errors appearing on the record. Section 12,247, Ohio General Code, as amended by Ohio Laws 103, pp. 405, 431. The question therefore is not properly before us. Mutual Life Insurance Co. v. McGrew, 188 U. S. 291, 308, 309.
>
> The writ of error must be dismissed for want of jurisdiction."

Further, as pointed out by the Court of Appeals in the instant case by its citation of *Nelson v. County of Los*

Angeles, decided by this Court February 29, 1960, the same rule continues in force even to the raising of constitutional questions, many of which, of course, involve considerations of the life or liberty of a party. In short, the refusal of a Court of Appeals to consider a point not raised below is an exercise of discretion, *Madison v. Phillips*, 254 F. 2d 348 (C. A. D. of C.—1958) which will not be reviewed by this Court unless abuse appears. *Ray v. United States*, 301 U. S. 158, 166 (1937). Clearly the action of the Court of Appeals in following a uniform rule of appellate procedure does not present a "departure" from but rather shows adherence to "the accepted and usual course of judicial proceedings" referred to in Supreme Court Rule 19. Indeed only if the Court of Appeals had entertained Petitioner's novel claim would an abuse of discretion have been presented. *Union Pacific Railroad v. Johnson*, 249 F. 2d 674, 677 (C. A. 9—1957).

C. Petitioner's reliance upon Ohio law was correct; no maritime claim was involved.

Although Petitioner claims (petition p. 7) that the decision of the Court below is reviewable in connection with "four basic concepts of law," actually only one of these, the third (petition p. 14) in which Petitioner complains that "the Court below would not pass on the subject" of the applicability of maritime principles, is available as a question for review.

In regard to this question we have shown that it would constitute a serious abuse of discretion for an appellate court to pass upon a new and conflicting theory of the case, even if in itself meritorious, when such theory was never presented to the trial court.

But here the alternate theory was not meritorious, and the justice of the Court of Appeals' disposition of the

case is thereby fortified. Petitioner's new and conflicting theory of the case—the claim that maritime law applied—was not clearly meritorious and was at best highly questionable.

Petitioner's claim that maritime law applies—and all the remaining three of the four basic concepts of law which Petitioner says are challenged by the decision below—hang by the single thread of Petitioner's glib statement (petition p. 14) that "The gangway leading to a ship *has always been* considered an appurtenance thereof."

On the contrary the record in the present case conclusively showed that the gangway in question was an appurtenance of the shipyard—not of the ship. The gangway:

(a) Was not furnished by the ship (64a).

(b) Was not owned by the ship (63a).

(c) Was not in use for the convenience of the ship's personnel (19a, 58a, 60a).

(d) Was not the sole means of access to the ship (28a).

Instead the gangway in the present case was owned and furnished by the shipyard for the convenience of its own repairmen—as the petition admits (p. 4). In short, unlike the Steamer AYERS' regular boarding ladder which was furnished and put in place for the convenience of Petitioner—(regarding which Petitioner testified):

> "Q. And the Steamer AYERS also had boarding ladders like that one aboard ship too, didn't it?
>
> A. Yes, it did.
>
> Q. And the steamer did put that boarding ladder over the side by means of pulleys up to the stack?
>
> A. Yes, sir." (p 28a.)

which boarding ladder was, properly speaking, an adjunct of the ship), the ramp or brow or gangway from which Pe-

titioner fell was part of the shipyard equipment and, as such, appurtenant to the shipyard and its dock.

This being the evidence, Petitioner failed to meet the criterion for application of maritime la. laid down in *The Admiral Peoples*, 295 U. S. 649 (1935) (petition p. 14). That case involved an action in rem against the ship by one of the ship's passengers who fell from the ship's gangplank to the dock. The Court said, p. 651:

> "The basic fact in the instant case is that the gangplank was a part of the vessel. It was a part of the vessel's equipment which was placed in position to enable its passengers to reach the shore. It was no less a part of the vessel because in its extension to the dock it projected over the land * * *."

It should be emphasized that the Court in *The Admiral Peoples* did not lay down a hard and fast rule that *all* accidents on gangways were subject to maritime law or that *all* gangways must be considered part of the ship or must be deemed ship's equipment. Instead the Court prefaced the demarcation made in that case by saying, 295 U. S. p. 651:

> "This is one of the border cases *involving the close distinctions* which from time to time are necessary in applying the principles governing the admiralty jurisdiction."

The close distinction made in *The Admiral Peoples* was recognized in *U. S. F. & G. Co. v. United States*, 56 F. Supp. 452 (D. C. S. D. N. Y.—1944), where the Court speaking of that decision said at p. 453:

> "The determining factor there was said to be the fact that the means of travel was furnished by and was a part of the vessel."

The Court of Appeals for the Second Circuit in *Vega v. United States*, 191 F. 2d 921 (C. A. 2—1951), cert.

denied 343 U. S. 909, affirming 86 F. Supp. 293 (D. C. S. D. N. Y.—1949) upon the district judge's opinion made the same distinction in holding that an injury on a gangway platform, not a part of the vessel's equipment and not furnished by the vessel owner, was not within admiralty jurisdiction. In that case the Steamship ALCOA POLARIS, under bare boat charter to the United States, was moored to a pier undergoing conversion. The gangway and gangway platform "not a part of the ship's equipment" were similar in construction to the gangway in the case at bar (see Statement, *supra*, p. 3) and were erected by the shore contractor to facilitate ingress and egress of its employees engaged in the conversion. An employee of the shore contractor leaving the ship slipped and fell on the gangway platform on ice caused by the ship and brought a libel in admiralty against the United States. The libel was dismissed, the Court saying p. 293:

> "The court is of the opinion that the libel against the United States must also be dismissed for lack of jurisdiction over the subject matter of the action. Until the enactment of Public Law 695, Chapter 526, 62 Stat. 496, 46 U. S. C. A. § 740, on June 19, 1948, a tort was within the admiralty jurisdiction of the United States Courts only if the injury was done on navigable waters, or on some part of a vessel floating on navigable waters but not if it was done on land even by a vessel on navigable waters. See The Admiral Peoples, 295 U. S. 649, 55 S. Ct. 885, 79 L. Ed. 1633. The platform on which libellant slipped and fell was not a part of the Alcoa Polaris, nor attached to it. It was nailed and bolted to the pier. In contemplation of the law it is 'to be deemed an extension of the land.' Smith & Son v. Taylor, 276 U. S. 179, 182, 48 S. Ct. 228, 229, 72 L. Ed. 520. The libel must accordingly be dismissed as not within the admiralty jurisdiction of the United States, * * *."

Furthermore, unlike the situation in the present case, in *The Admiral Peoples* and in all of the cases cited by the petition (p. 15), except for the case of *Standard Oil Co. v. Robins Drydock and Repair Co.*, 32 F. 2d 182 (C. A. 2—1929), which did not involve any maritime claim at all, it was the vessel or vessel company which was being sued and the tortious conduct complained of emanated from the ship and either took effect aboard the ship proper or upon part of the ship's appurtenant equipment. In the circumstances of those and similar cases it was eminently fair that the admiralty jurisdiction to which a vessel owner is customarily subject could not be defeated by the accidental circumstance of "direction of travel" or technicality that the ultimate injury may have been sustained on land.

Suffice it to say that none of the authorities cited by Petitioner supports the application of maritime law to the present case and in our search we can find no such authority which so holds. The *Curd* case, 213 F. 2d 864, 866 (C. A. 5—1954), *supra*, which is practically on all fours with the present case supports the contrary conclusion. True, it is said in both *Ford v. Parker*, 52 F. Supp. 98 (D. C. Md.—1943) and *Caldaro v. B. & O. Railroad Co.*, 166 F. Supp. 833 (D. C. E. D. N. Y.—1956), that when a ladder or gangway constitutes the sole access to a vessel, it is in that sense part of the ship's equipment so that the party who furnishes it is not material, but in both these cases the claim was against the shipowner, the structure involved was the only available means for boarding the vessel, and in the *Caldaro* case the gangplank was the property of the ship and clearly part of its equipment.

Here the situation is significantly different—the party sued is not a vessel owner, the conduct complained of emanated from its operation on shore and allegedly took

place on part of its land based equipment. The gangway on which Petitioner fell was not attached to the vessel (63a, 64a). The gangway was attached to the platform, but the mere fact that the platform was attached to a vessel on navigable water—a vessel, which we wish to remind the Court was laid up for the winter and withdrawn from navigation—is, we submit, too feeble a connection to justify the ousting of the common law applicable to an occupier of land, such as this Respondent, and if such a thought ever occurred to Petitioner—who is and was represented by competent admiralty counsel—prior to the time he had lost in the trial court he must have rejected it as unrealistic and devoid of merit.

At best a claim for the application of maritime law in this case—a claim which was never made—would possibly have fallen in the "twilight zone" referred to in *Davis v. Department of Labor*, 317 U. S. 249, 254, 256 (1942), but in such event a presumption of constitutionality would have arisen in favor of state competence to deal with it. 317 U. S. p. 257.

CONCLUSION.

For the reasons foregoing it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS V. KOYKKA,
1144 Union Commerce Building,
Cleveland 14, Ohio,
Counsel for Respondent.

ROBERT G. MCCREARY, JR.,
Of Counsel.

No. 33,453.

In the United States District Court

FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

PETER HOLM,

Plaintiff,

vs.

THE AMERICAN SHIP BUILDING COMPANY,

Defendant.

ANSWER.

Now comes the defendant, The American Ship Building Company, by its attorneys, Arter, Hadden, Wykoff & Van Duzer, and for answer to the complaint herein respectfully alleges as follows:

I.

Answering the allegations of the paragraph marked "FIRST" of the complaint, defendant admits that it is a New Jersey corporation and that in the conduct of its business maintains places of business in the State of Ohio.

II.

Answering the allegations of the paragraph marked "SECOND" of the complaint, defendant is without sufficient information to form a belief as to the truth of the allegation that plaintiff is a citizen of the State of Wisconsin and therefore denies the same. Defendant admits that the prayer of plaintiff's complaint exceeds the amount of Three Thousand Dollars ($3,000.00) exclusive of interest and costs, but denies that the plaintiff is entitled to recover any amount whatsoever.

III.

Answering the allegations of the paragraph marked "THIRD" of the complaint and without intending to deny that plaintiff was injured on or about March 8, 1955, defendant does deny that such injuries as plaintiff may have sustained occurred in the manner alleged and denies that plaintiff was injured in the manner or to the extent alleged in said paragraph marked "THIRD" of the complaint. Further, defendant denies each and every remaining allegation of said paragraph marked "THIRD" of the complaint.

IV.

Defendant denies each and every, all and singular, the allegations contained in the paragraphs marked "FOURTH," "FIFTH," "SIXTH," and "SEVENTH" of the complaint.

V.

Defendant denies each and every allegation contained in the complaint not hereinbefore specifically admitted to be true.

VI.

Further answering and by way of defense, defendant says that any injury or damage that plaintiff may have sustained on or about March 8, 1955 was caused solely and proximately by plaintiff's own carelessness, negligence and inattention for his own safety in the premises.

VII.

Further and by way of defense, defendant says that if it should be found upon the trial of this cause that defendant was negligent in any manner with respect to any injury or damage which plaintiff may have sustained by reason of the alleged occurrence of March 8, 1955, which defendant specifically denies, then and in that event, plaintiff's own carelessness, negligence and inattention for his own safety in the premises directly and proximately contributed to cause such injury or damage as plaintiff may have sustained.

VIII.

Further and by way of defense, defendant says that the area wherein the plaintiff was allegedly injured was well known to the plaintiff at all times and any injury or damage that plaintiff may have sustained by reason of the alleged occurrence of March 8, 1955 was caused by risks which were voluntarily assumed by the plaintiff.

WHEREFORE, having fully answered, defendant prays that the complaint herein be dismissed and that defendant may go hence with its costs.

ARTER, HADDEN, WYKOFF & VAN DUZER,
By /s/ ROBERT B. PRESTON,
Attorneys for Defendant;
The American Ship Building Company.

TRANSCRIPT OF EVIDENCE ON TRIAL.

* * * * *

PETER HOLM, the Plaintiff herein, called as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

* * * * *

CROSS EXAMINATION OF PETER HOLM.

By Mr. McCreary:

* * * * *

(56) Q. There was a light up at the top of that gangway, was there not? A. Yes, sir.

Q. In fact you replaced the bulb in it on one occasion? A. Yes, sir.

Q. There was a switch on it, wasn't there? A. I think there was, yes.

Q. And it was a ship's light, using power from the shore? A. Right.

Q. It was part of your ship's equipment? A. The light was, yes.

(57) Q. And when that light was burning it enabled you to see sufficiently so you could see where you were going on the ramp, isn't that correct? A. Yes, sir.

* * * * *

(60) Q. And when you passed that position the light at the top of the gangway was burning, was it not? A. Not at that time of the day it wasn't, no, unless I forgot to leave it on. I was supposed to turn it off during the daytime.

Q. Do you say the light was not burning at that time when you left to go up town to get some groceries? A. I don't remember whether it was or not.

(61) Q. I ask you again, referring to your deposition, whether you testified as follows, and I am referring to the day of the accident:

"Q. When you left the ship to go down the ramp was the light burning at the top of the ramp?

"A. Yes, sir."

Did you so testify? A. Well, yes, I could have, yes.

Q. Do you admit you did so testify? A. Yes.

* * * * *

RE-DIRECT EXAMINATION OF PETER HOLM.

By Mr. Landskroner:

* * * * *

(78) Q. Now, can you tell us with reference to the lights. You have already stated that there was a light on top of the ramp, is that correct? A. Yes, sir.

Q. Now, was that light burning when you went up the ramp? A. Yes, sir.

* * * * *

(79) Q. How many watts in the bulb? A. I would say 60 or 70.

* * * * *

Thereupon the Plaintiff called as a witness MICHAEL T. DOUGHERTY, who, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF MICHAEL T. DOUGHERTY.

By Mr. Landskroner:

* * * * *

(86) Q. This is an ore boat, is it not? A. Yes, it is.

Q. Calling your attention to those little ladders on the side, whatever they are—what are they? A. Those are the ladders the crew uses to go aboard and leave the ship when the ship is in operation in the summer sailing season.

* * * * *

Thereupon the Plaintiff called as a witness A. W. HAAS, who, being first duly sworn, was examined and testified as follows:

* * * * *

CROSS EXAMINATION OF A. W. HAAS.

By Mr. McCreary:

* * * * *

(105) Q. You were asked about the wattage of the lights at the head of the gangway. Were there any other lights burning (106) in the area? A. Yes, there was.

Q. Did you have anything to do with turning those lights on? A. Yes, sir, I turned those lights on at 6 o'clock.

Q. And were you then making your rounds? A. Making the 6 o'clock rounds, yes, sir.

Q. Had Mr. Holm started back to the ship before 6 o'clock? A. Yes, sir.

Q. Was it daylight at that time? A. Yes, sir.

Q. And how long did it remain daylight? A. It remained daylight till about 6:45, 6:50.

Q. And when you went by the gangway were the lights still burning that you had turned on? A. Yes, sir.

Q. How far away was the closest light to the midship section of the Steamer Ayers where the ramp was? A. That would be the pole lights, the flood lights on the pole. Those poles are 65 feet high and there is three bulbs on the cross bar up above, three bulbs in those flood lights. They have reflectors on them and those bulbs are 1500-

watt bulbs apiece, and they were six bulbs burning on the Burton Ayers.

Q. You mean they were directed towards the Burton Ayers? (107) A. Yes, they are focused, in other words, put on these poles, and they are shined to the after end or forward end of the boat. It was all lit up down there.

Q. And were those lights burning continuously from the time you turned them on? A. Yes, sir.

Q. And did they provide good illumination on the ramp? A. Yes, sir.

Q. Or gangway? A. Yes, sir.

* * * * *

Thereupon the plaintiff called as a witness GORDON STAFFORD, who, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF GORDON STAFFORD.

By Mr. Landskroner:

* * * * *

(119) Q. How did they get over the Ayers? A. Went up the ramp and across the deck of the Ayers there. (120) They would go over a little ramp which was made out of planking, with handrail guards on it, and walk across and go over to the deck of the boat alongside.

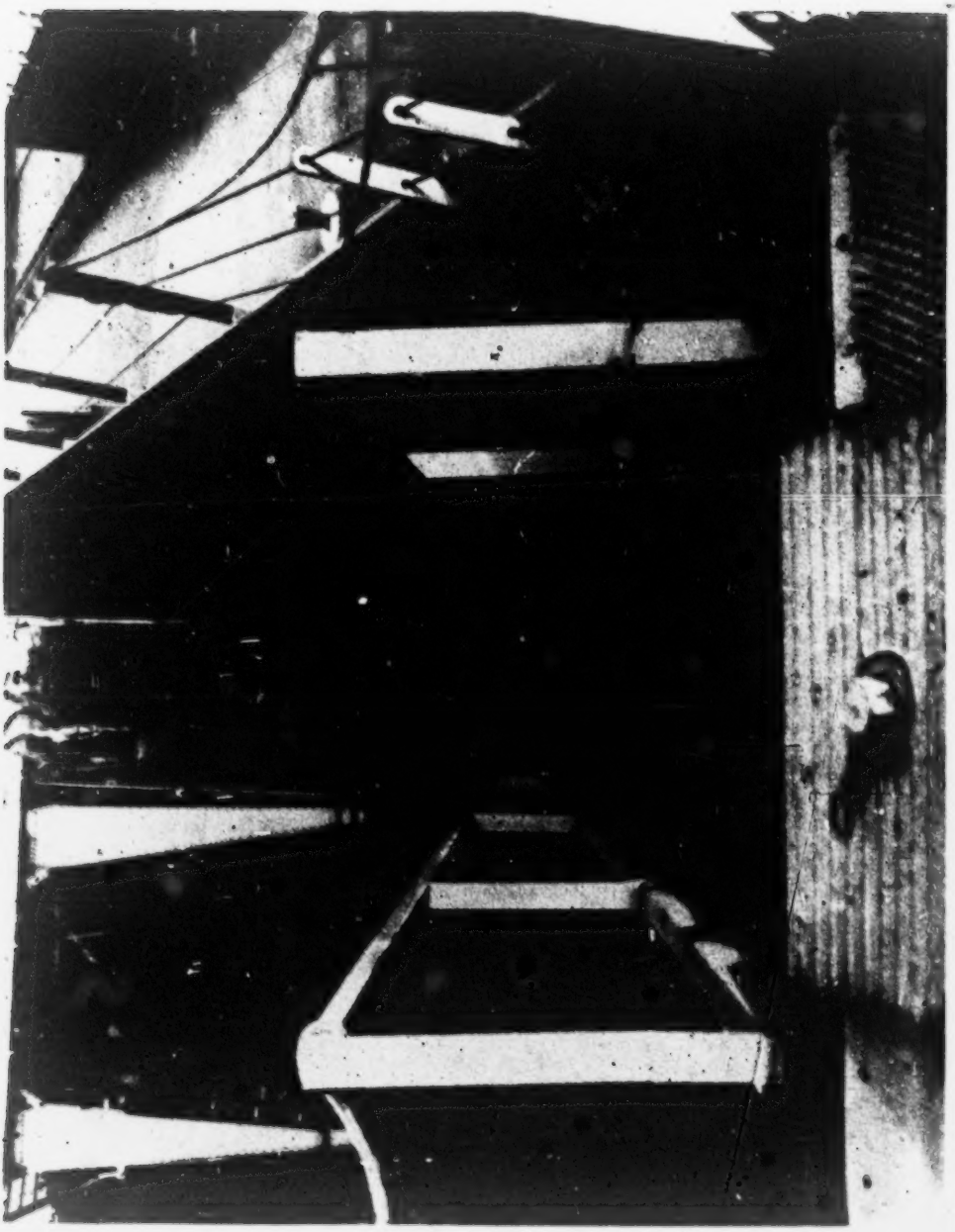
* * * * *

PLAINTIFF'S EXHIBIT 2.

Side View of Gangway.

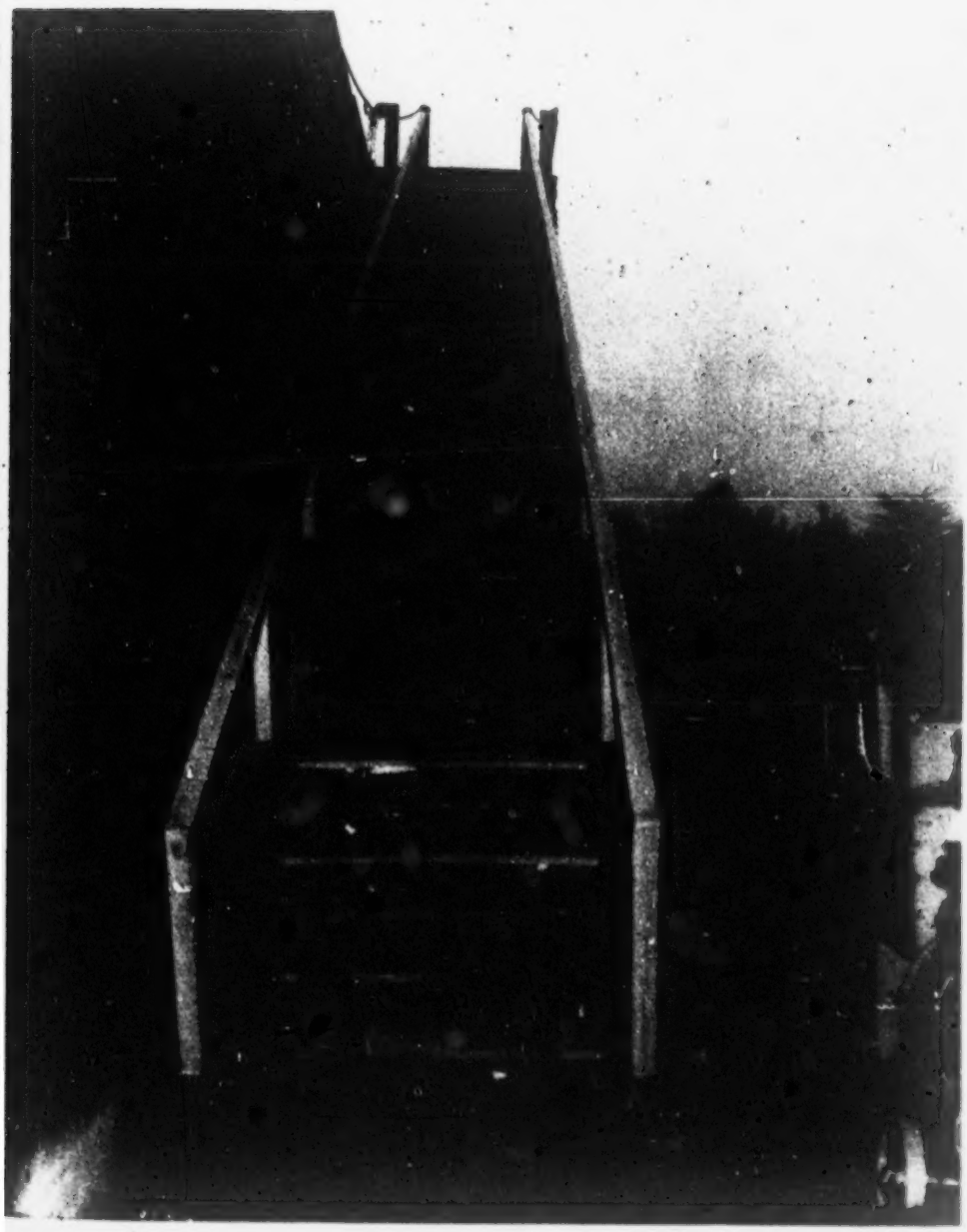
PLAINTIFF'S EXHIBIT 1.

View of Gangway From Top.



DEFENDANT'S EXHIBIT B.

View of Gangway From Bottom.



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Supreme Court, U.S.
FILED
SEP 13 1960
JAMES R. BROWNING, Clerk

Supreme Court of the United States

October Term, 1960

No. 166

PETER HOLM,

Petitioner,

against

AMERICAN SHIP BUILDING COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

S. ELDRIDGE SAMPLINER,
Counsel for Petitioner,

GOLDSTEIN & STERENFELD,
VICTOR G. HANSON,
Of Counsel,
32 Broadway,
New York 4, New York.

HARVEY GOLDSTEIN,
On the Brief.

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Statement

This reply brief by petitioner is in answer to statements set forth on several pages of respondent's brief in opposition to this petition.

On page 2: Respondent's statement implying that the boarding ladder was available for use by petitioner during the repair period involved herein is incorrect. A boarding ladder was available for use during the navigation season and was evidently available for use aboard another ship during a pervious winter. There was nothing in the record to show whether that other ship was being repaired or the conditions existing thereon. The proof however was that in the instant case the ship's ladder was not used during this particular lay-up. The gangway provided by respond-

ent was in place when petitioner arrived to take on his duties as shipkeeper (50).[1]

On page 3: The vessel may well have been equipped with the regular boarding ladder but it was not in use during the period involved herein. Petitioner used the gangway provided by respondent for four months without any demand by respondent that he stop. The ladder was not available at any time. Testimony showed that the gangway was the sole means of access to and egress from the vessel, as stated by petitioner (37-38) and by respondent's general manager of the shipyard, still employed by respondent at the time of trial (126).[2]

The testimony was to the effect that the platform was secured to the side of the ship at deck level, that the gangway was then bolted to the platform. The platform and gangway moved with the ship and was not attached to the dock. A concrete roller was placed under the lower end of the gangway to facilitate the movement of the gangway with the ship.

On page 7: Nothing in the trial record substantiates an assertion by petitioner of a specific theory of liability, to the exclusion of his maritime rights. An allegation of applicable law was in the complaint. General maritime law principles were not rejected by petitioner. The question involved is whether the District Court recognized the jurisdictional issue involved, considered it and then erroneously rejected the applicability of maritime principles.

On page 8: Nothing in the trial transcript suggests that the the Court did not consider the applicability of

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[1] Pages of the Trial Minutes.

[2] Since both hands are used in ascending a boarding ladder, how petitioner could have used such a ladder with safety while carrying packages of food and other incidentals necessary for living aboard the vessel, remained unanswered by the Courts below.

admiralty principles. On the contrary, the Trial Judge's statement expressly rejecting said principles is clearly shown on page 137. Exception to the decision was properly made.

Petitioner's position in the Court of Appeals was the same as it is herein. Maritime principles applied in this matter because the accident occurred on the gangway of the vessel, an appliance of the ship, in navigable waters. Locale gave rise to the maritime jurisdiction. The District Court did not reject that maritime jurisdiction because of the failure of petitioner to announce the applicability of the general maritime law. The Court believed that since the gangway was owned by respondent rather than the shipowner, maritime principles were inapplicable since petitioner was not employed by respondent (137) who was in the business of repairing the ship (138) and who attached the gangway to the ship only for use of its own employees (138). The allegations in the complaint were used as a crutch by the Trial Court to justify its conclusions of law.

On page 9: The issue of "choice of law" is not involved where there is no choice available. In this case only maritime jurisdiction was available to the plaintiff since the accident occurred aboard a ship located in navigable waters at the time of the accident. As such, there was no conscious choice of one of two applicable legal remedies but rather allegations of fact which conclusively established the applicability of admiralty principles. The allegations of common law applicability were incorrect, were surplusage and immaterial. The sole question was whether the Trial Judge understood the issues and made a conscious determination of which law was applicable.

On pages 9, 10, 11: Respondent cites *Curd* v. *Todd*, 213 F. 2d 864 in support of its position. That case may be distinguished as follows: (1) Curd was a jury verdict. The case at bar was a directed verdict by the Trial Judge.

The question herein was whether the Court was correct in its ruling as to applicable jurisdiction. In the *Curd* case the Trial Court made its decision, no objection was taken and the jury was then charged on the basis of that jurisdictional determination. The charge then became the law of the case, not necessarily the correct law, but simply the law of the case. Failure to except to the charge destroyed the issue on appeal; (2) Curd was on the vessel for the exclusive benefit of the shipowner. Petitioner was on the vessel involved herein for the mutual benefit of the shipowner and respondent. The evidence of that dual capacity was erroneously held inadmissible by the Trial Judge (120-123).

On page 12: *Virginian* v. *Mullens*, 271 U. S. 220 (1926) was decided before promulgation of the Federal Rules. Only tort liability was pleaded. The issue of contractual liability did not arise during the trial, was never defended by the defendant and so could not be brought up on appeal. In the case at bar, the Trial Judge recognized that there was a question of admiralty jurisdiction and expressly rejected it. Respondent herein could not have been further aided by any defense he might have pleaded to the applicability of maritime jurisdiction, since the motion for the directed verdict was granted.

On pages 12, 13, 14: *Valley* v. *Wattawa*, 244 U. S. 202 (1917) and *Nelson* v. *County*, 362 U. S. 1, held only that Constitutional questions not raised in the Courts below would not be considered by this Court for the first time. In the case at bar the Trial Judge considered and rejected the applicability of admiralty jurisdiction. The Court of Appeals further rejected the contention that maritime principles were involved when the issue was specifically raised on appeal.

On page 15: Petitioner's statement was not glib but was grounded upon decisions by this Court and others

throughout the nation. Locale was the sole test of applicability of admiralty jurisdiction. A gangway has repeatedly been held to be a part of the ship regardless of its owner. The gangway herein was the ship's appurtenance not only as a means of access and egress to and from the ship but also for a second vessel moored outboard to the vessel involved herein. Though neither owned nor furnished by the shipowner, it was for the convenience of petitioner as shipkeeper as well as for the four hundred repairmen using the gangway daily. Certainly the gangway was not attached specifically for petitioner's use but he used it exclusively for four months. No ladder or other means of access was given him. If he did not have express consent of respondent he certainly had its acquiescence since respondent admittedly knew of its use and permitted petitioner to continue, knowing that there was no other way that he could safely board the ship when carrying any articles. The fact that the ship had a ladder, not in use during the lay-up because of the employment of the gangway, does not even imply that the petitioner was thus afforded another means of access to the vessel.

On page 16: *Admiral Peoples*, 295 U. S. 649, stated that the gangway was part of the ship and that an accident occurring on the gangway was within the maritime jurisdiction. The decision was further affirmation of the well settled rule that locale was the sole test of admiralty jurisdiction. All cases having the question raised have reached the same conclusion—without exception.

Vega v. *United States*, 86 F. Supp. 293, aff'd 191 F. 2d 921,[3] concerned a maritime worker, employed by a general

[3] The *Vega* case was first called to petitioner's attention by Judge Pope at oral argument in the Court below. Petitioner was not familiar with the case and was requested to distinguish *Vega* from the case at bar in a reply brief. Noteworthy is the fact that *Vega* was not cited by the Court below in its opinion. *Vega* was, in fact, a further implication that if the platform on which the accident occurred was attached to the vessel and was not nailed and bolted to the pier, admiralty jurisdiction would have been held applicable.

contractor, who was injured on a pier platform. The vessel moored at the pier, was afforded a gangway by the contractor, which gangway was attached to the vessel and which rested at its lower end upon rollers (thus permitting the ship and the gangway to surge with the tide), in turn resting upon the "platform eight to twelve inches above the level of the pier to which it was nailed and bolted". Plaintiff slipped not upon the gangway attached to the ship but upon the pier platform nailed and bolted to the pier.

The Court held that the suit, against the United States, was subject to Title 46 U. S. C. § 740 which, prior to its amendment did not provide for an action to lie against the government if the accident occurred "on land owned by a vessel in navigable waters". The pier platform was then deemed an extension of the land since it was to the land that it was bolted.

Even in absence of the issues pertaining to the interpretation of the statute, the *Vega* case was clearly distinguishable from the case at bar in which the accident occurred on the gangway attached to the ship—not on a platform attached to the pier.

Petitioner's statement in the petition was neither glib nor in error. The gangway leading to a ship has always been considered an appurtenance thereof. No distinction has been made on the issue of ownership of the equipment. *Ford v. Parker*, 52 F Supp. 98; *Caldaro v. Baltimore*, 166 F. Supp. 833.

See also: *Alaska v. Petterson*, 205 F. 2d 478, aff'd 347 U. S. 396, in which equipment brought aboard the vessel by stevedores was held to be part of ship's equipment under the doctrine of seaworthiness. The same rights would be applicable under negligence concepts if there was notice that the equipment was aboard the ship and of its defective condition. Both elements were herein present.

Aho v. *Jacobsen*, 249 F. 2d 309, is a noteworthy example of discredited law. The case concerned an injured seaman suing a shipowner of another vessel lying inboard to his own ship and upon which he had to pass in order to go to and from the pier. The Court held the plaintiff to be a licensee citing the *Kermarec* v. *Compagnie* decision in the Court of Appeals, 245 F. 2d 175 (the decision of this Court, 358 U. S. 625, reversing the Court of Appeals decision had not come down as yet). In rejecting the *Kermarec* dissent in the Court of Appeals decision, the Court in *Aho* made the very distinction between an invitee and licensee that this Court rejected in upholding the *Kermarec* dissenting opinion in the Circuit Court. The *Aho* case is the true example of rejected law that the Court below employed and which is now asserted by respondent.[4]

Although the decision by the Court of Appeals in *Aho* upheld the now rejected distinction between a licensee and

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[4] *Aho* v. *Jacobsen*, 249 F. 2d 309:

"The plaintiff in this appeal contends that he had a maritime right to cross from the inboard boat in order to reach his boat and that the defendant had an affirmative duty to keep her boat in a reasonably safe condition for the plaintiff's passage.' The plaintiff further contends that he was a business invitee, to whom was owed a duty of exercising due care.

(1) We must treat the plaintiff's complaint alleging damages resulting from defendant's negligence as one involving a maritime tort. The plaintiff's right of recovery is rooted in federal maritime law. *Pope & Talbot, Inc.* v. *Hawn*, 1953, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143; *Leathers* v. *Blessing*, 1881, 105 U. S. 626, 26 L. Ed. 1192. Massachusetts law is, therefore, not controlling in this case.

Plaintiff contends that a seaman who is forced to cross an inboard vessel in order to reach a pier is owed a duty of reasonable care by the owner of the inboard vessel. There is language

[Continued on page 8.]

invitee, the question of whether Aho was aboard the vessel for the mutual benefit of the owner and the defendant was raised and was rejected by that Court as immaterial. The reversal by this Court of the Court of Appeals decision in *Kermarec* clearly established that a person on board a

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[Continued from page 7.]

in *Anderson* v. *The E. B. Ware, Jr.*, C. C. E. D. La. 1889, 38 F. 44 to the effect that the master and owner of the inboard vessel owe a duty to members of the outboard vessel to see that they are not injured in crossing the inboard vessel because of the negligence of the master." (p. 311)

* * *

"In other recent cases involving maritime tort actions, alleging unsafe conditions aboard the shipowner's vessel, brought by persons other than the shipowner's employees or employees of independent contractors hired by the shipowner, it has been found necessary to determine whether the plaintiff was a licensee or invitee. This preliminary finding has been required in order to ascertain what standard of care is owed to the injured person." (p. 311)

* * *

"It is argued that plaintiff and defendant had a community of interest in that very possibly defendant's vessel might on occasion be in an outside position and it would be to the economic benefit of the owner for her crewmen to be able to cross the decks of the inboard boat. The extension of the status of business invitee to those who are on premises at a certain time for their own purposes and not for the purpose of having business dealings with the property owner has been widely accepted in certain circumstances. Usually, however, these cases concern premises open to the public such as shops where there is at least the present economic benefit to the owner of giving the invitee the opportunity of seeing and perhaps forming a desire for some of the wares on display. *Renfro Drug* v. *Lewis*, 149 Tex. 507, 235 S. W. 2d 609, 23 A. L. R. 2d 1114. In the instant case, plaintiff had no intent to do business with the defendant at any time in the future and, conversely, there is no indication that defendant could obtain any present or potential economic benefit from the plaintiff. The trial court was correct when it held that the plaintiff was a licensee as a matter of law." (p. 312)

vessel for the benefit of the shipowner and others was an invitee and entitled to reasonable care.

Petitioner herein was on the vessel for the mutual benefit of respondent and the shipowner. Evidence was offered on the very point and the record was proffered upon the Trial Court's ruling that it was inadmissible (120-123). Clearly, the evidence was material and admissible. Its rejection by the Trial Court was reversible error.

On page 18: There was no "twilight zone" when an accident occurred aboard a vessel, or any part thereof, located in navigable waters at the time. There was and is admiralty jurisdiction in this matter.

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of this petition.

Dated: New York, N. Y., August 29, 1960.

Respectfully submitted,

S. Eldridge Samplisner,
Counsel for Petitioner.

Goldstein & Sterenfeld,
Victor G. Hanson,
of Counsel.

Harvey Goldstein,
on the Brief.